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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/691,581	10/24/2003	Erich P. Lerchenfeld	07738.0173-01000	6955

7590 03/09/2007
Finnegan, Henderson, Farabow
Garrett & Dunner, L.L.P.
1300 I Street, N.W.
Washington, DC 20005-3315

EXAMINER

PADEN, CAROLYN A

ART UNIT	PAPER NUMBER
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1761

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	03/09/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No. 10/691,581	Applicant(s) LERCHENFELD ET AL.	
	Examiner Carolyn A. Paden	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 30 January 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-39 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-39 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on January 30, 2007 has been entered.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zawistoski (2002/0048606 or WO 00/45648).

Zawistoski discloses a method of preparing microparticles of phytosterols and phytostanols. It is very well known in the art that phytostanol is the hydrogenated version of a phytosterols. From the PG Pub at page 3, paragraph 0040, the particle size of the starting material is described to preferably be at 100 microns. At page 2, paragraph 0017, the microparticles are described as having the particle size of the claims. At

example 1, yoghurt is prepared with microparticulates of phytosterols and/or phytostanols by mixing phytosterols with milk powder and milk, allowing the milk mix to stand at room temperature and then homogenizing the combination in a microfluidizer. In this case milk is regarded to be an aqueous material. The pressure used in the microfluidizer is disclosed at page 2, paragraph 0025. The absence of emulsifiers in the product is shown at page 15, example 1. In example 5 a soy beverage drink is prepared. The claims appear to differ from Zawistoski in the recitation of the particle size of the starting material. No unobvious or unexpected result is seen from the particle size of the starting material, particularly with the final particle size falls within the range of the claims. Although viscosity is not mentioned, this property is an inherent feature to the product produced by the process. No unobvious or unexpected result is seen from the suggestion of the product viscosity. No unobvious or unexpected result is seen from such a particle size distribution. One of ordinary skill in the art would expect that a ground particle would have a distribution in of particle sizes. Claims 25-31 also appear to differ from the reference in the inclusion of fruit juice. The use of Zawistowski in beverages is clearly shown in example 5 and on page 1, paragraph 0012. Although orange

juice is not specifically mentioned in Zawistowski, orange juice is known in the art to be a vehicle for providing nutrients to consumers. It would have been obvious to one of ordinary skill in the art to extend the teachings of Zawistowski to the fortification of orange juice with phytosterols in order to provide a vehicle for fortifying foods with cholesterol reducing phytosterols. It is appreciated that the brix level of the juice is not mentioned but brix level in orange juice is a known way of expressing the extent of concentration of the orange juice.

Applicant argues that Zawistowski teaches away from the use of homogenizers. This has been considered but is not persuasive because the process performed in Zawistowski is called "homogenization" in the examples. The fact that Zawistowski like one type of apparatus for homogenizing more than the other does not alter the fact that the process is an homogenizing process.

The rejection of the claims over Yoon has been withdrawn because Yoon uses an emulsifier.

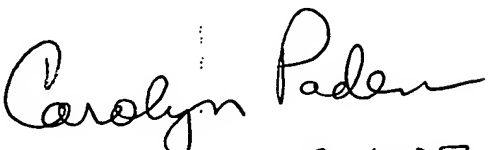
No claim is allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone

number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on (571) 272-1398 or by dialing 571-272-1700. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


CAROLYN PADEN 3-6-07
PRIMARY EXAMINER 1761